Supreme Court No.81020-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK KILGORE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Vicki Hogan, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REVIEW

1. When does a judgment become final following a partially successful appeal? In the past, this Court has found federal case law on the issue of finality to be persuasive authority. Those federal cases hold that whenever a mandate provides discretion to the trial court to modify the judgment, that judgment is not final until the trial court has acted on that remand. This rule is easy to apply and ensures consistent treatment to similarly situated defendants. Should this Court follow those well-reasoned federal decisions?

2. Does this Court's decision in *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993), bar consideration of an appeal where there has been a change in the law, and the sentence re-imposed is now unconstitutional under the federal constitution?

B. STATEMENT OF FACTS

A more complete set of facts is set forth in Mr. Kilgore's petition for review. A brief summary is as follows. In 1998 Mr. Kilgore was convicted of seven offenses. He did not have any prior convictions, but because of the multiple offense policy, his offender score for each count was 18. SRP 1559-60. The court imposed an exceptional sentence of 560 months, twice the standard range. SRP 1583-84.

On his first appeal, the court reversed two convictions based on the exclusion of exculpatory evidence. State v. Kilgore, 107 Wn. App. 160, 177-82, 26 P.3d 308 (2001). This Court affirmed that ruling (State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)), and the case was remanded for "further proceedings." The date of the mandate was October 2, 2002.

With the State neglecting to bring Mr. Kilgore back to court for a new sentencing hearing, Mr. Kilgore retained counsel and brought a motion for a sentencing hearing. Through counsel, Mr. Kilgore filed a brief on July 15, 2005 demanding a standard range sentence pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed2d 403 (2004) and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). CP 31 - 49.

The court refused to do so, finding that Mr. Kilgore was not entitled to a sentencing hearing, and that the court would simply "correct" the judgment and sentence. CP 101-104. (The trial judge's actions are described in more detail in the court of appeals decision and previous briefs submitted in this matter)

Mr. Kilgore appealed. Following oral argument before a panel at Division II, the court of appeals dismissed the appeal. There were three separate opinions: a majority decision (signed by one judge), a dissent, and a concurrence in the result. Although there appeared to be little agreement, all three judges agreed that the mandate gave the court discre-

tion to impose a different sentence on the remaining convictions. The "majority" opinion concluded that because the trial judge merely corrected the judgment and sentence to eliminate two convictions and adjust the offender score, the judgment was final when the mandate was issued in 2002. The majority further concluded that because the trial judge elected not to exercise its discretion, the judge's order modifying the sentence was not appealable under RAP 2.5.

C. SUMMARY OF ARGUMENT

A case becomes final when the conviction and sentence are no longer subject to change. Thus, when a mandate allows a trial court to exercise "discretion, skill or judgment" in modifying the judgment following remand, the judgment cannot be final until the judge has either modified the judgment or declined to do so.

In the present case, the appellate court in the first appeal reversed two convictions and remanded the judgment for "further proceedings." As acknowledged by the court of appeals, this was an open-ended mandate. As such, the judgment was not final. It was not until the "further proceedings" occurred on July 15, 2005, that the judgment became certain and had the potential to become a final judgment. Because *Blakely* was decided before that date, *Blakely* should have been applied to Mr. Kilgore's sentence. The judge failed to do so. Reversal of the sentence is required.

D. ARUGMENT

1. Because the judgment and sentence was not final, petitioner had the right to demand on remand that the court resentence him within the standard range.

a. Blakely applies to all cases not yet final.

Blakely v. Washington prohibits the court from imposing an exceptional sentence in the absence of jury findings as to the aggravating factors. To do otherwise, would violate the Sixth Amendment of the United States Constitution.

In *State v. Evans*, 154 Wn.2d 438, 637, 114 P.3d 627 (2005), this Court stemmed the potential flood of retroactive attacks on prior sentences by holding that "*Blakely* and *Apprendi* do not apply generally on collateral review." This holding was consistent with the general rule that a change in the law "applies retroactively only to cases pending on direct review or not yet final, not to cases on collateral attack." *State v. Abrams*, 163 Wn.2d 277, 290, 178 P.3d 1021 (2008). Accordingly, under *Evans*, a trial court is required to follow the mandates of *Blakely* when a judgment is not final, but need not correct every sentence of every inmate who received an exceptional sentence.

State v. McNeal, 142 Wn. App. 777, 175 P.3d 1139 (2008) illustrates this principle. In that case, a mandate was issued in 2002, a full two years before *Blakely*. Id. at 783. In 2006, however, the court of appeals

vacated McNeal's sentence based upon a non-*Blakely* sentencing issue raised in a PRP. Id. On remand, the trial court refused to adhere to *Blakely*, believing that the case was final in 2002 when the mandate was issued, thereby precluding the defendant from raising the issue. Id. at 784. The court of appeals reversed. The court found that while McNeal could not have raised the issue in a collateral attack, he was entitled to rely upon *Blakely* at his new sentencing hearing.[1] Id. at 787.

b. Key decisions from the state and federal courts define a "final judgment."

There are a few state and federal cases within the past ten years that have helped define what is meant by a final judgment following a partially successful appeal.

1. *In re Skylstad*

In re Skylstad, 160 Wn.2d 944, 162 P.3 413 (2007), provided this Court with the opportunity to address most of the issues raised in Kilgore's appeal. The primary issue in *Skylstad* was whether a judgment could be final if the sentence was not. The defendant in that case had appealed his conviction for first-degree robbery. The appellate court had

[1] While *McNeal*'s holding was correct on that issue, the court's attempt to distinguish itself from *Kilgore* was flawed. The *McNeal* court noted that the mandate in *Kilgore* did not *require* a new sentencing hearing, and so there was no obligation to apply *Blakely*. See *McNeal* at 787. As discussed below, because the mandate in *Kilgore* permitted the court to resentence Kilgore, the judgment was not final until the court acted on that remand.

affirmed his conviction but reversed his sentence. A mandate was issued in May of 2004. He was sentenced again a few months later, after which, Skylstad filed another appeal, this one challenging his second sentence. That appeal was denied and a mandate issued in 2006. Before his second appeal was final, however, Skylstad filed a PRP. The court of appeals dismissed that PRP as untimely, concluding that his judgment was final in 2004 when the mandate issued. This Court was called upon to determine whether a final judgment requires both a final conviction and a final sentence. *Id.* at 946-47.

In order to answer that question, this court examined the plain and legal meaning of the word "final" and the term "final judgment." This Court found the following definitions to be particularly relevant:

> [B]eing a judgment ... that eliminates the litigation between parties on the merits and leaves nothing for the inferior court to do in case of an affirmance *except to execute the judgment*." Webster's Third New International Dictionary 851 (2002) (emphasis added)
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> . . .
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> "(Of a judgment at law) *not requiring any further judicial action* by the court that rendered judgment to determine the matter litigated; concluded," Black's Law Dictionary 662, (8th ed. 2004) (emphasis added)
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> . . .
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> "A court's last action that settles the rights of the parties and *disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and en-*

> *forcement of the judgment."* Black's Law Dictionary 859 (8th ed. 2004) (emphasis added).
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> . . .
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> [A] final judgment " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)) (emphasis added).
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> . . .
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> "[I]n a criminal proceeding, a final judgment 'ends the litigation, leaving nothing for the court to do but execute the judgment.'" *State v. Taylor,* 150 Wn.2d 599, 601-02, 80 P.3d 605 (2003)

Skylstad at 949-50.

In applying the various definitions to the facts in that case, this Court explained that "here more needed to be done than simply executing the judgment—the superior court still had to determine Skylstad's sentence." *Id.* at 416. Accordingly, this Court concluded that "the May 14, 2004 mandate was not a final judgment since only the conviction-but not the sentence-was final." *Id.* at 417. Instead, the judgment did not become final until 2006, when his second sentence was affirmed on appeal. *Id.*

The same result is reached in Kilgore's case. When the court of appeals issued the mandate, they provided the trial court with discretion to change Kilgore's sentence to reflect the reduced current offenses. As such, on the date the mandate was issued, Kilgore's ultimate final sentence

on the remaining convictions was still unknown. There is no definition of "final" or "final judgment" in *Skylstad* that would permit Kilgore's case to be treated as final at the time of the mandate. The holding and reasoning in *Skylstad* dictate a reversal of the court of appeals decision in Kilgore's case.

ii. *The federal cases*

In *Skylstad*, this Court noted that while federal cases on the issue of finality are not dispositive, "their reasoning is both apposite and persuasive." *Skylstad*, at fn 4.

Although factually dissimilar, the court in *U.S. v. Burrell*, 467 F.3d 160 (2nd Cir. 2006) addressed the same retroactive application issue as that presented in Kilgore's case. In Burrell's first appeal, the appellate court affirmed one of his convictions, but remanded the other charge for dismissal. *Id.* at 163. Later there was a change in the law. The defendant wished to take advantage of that change, which was decided after the mandate was issued, but before the trial court had entered a dismissal order on the reversed conviction. The issue then was whether the defendant's convictions were final on the date the mandate issued.

Looking at other "finality" cases, the *Burrell* court observed that this question could be answered by looking at the nature of the mandate. Specifically, when an appellate court remands a case back to the lower

court for a "ministerial" duty that does not require "discretion, judgment or skill," the date of the mandate is the date of the final judgment. It is not necessary under those limited conditions to wait for the trial court to perform the "ministerial act" before calling the conviction final. *Id. at 164.*

The *Burrell* court then applied this "ministerial act" analysis to the facts in that case. The court's mandate had remanded the case to district court "in order that the district court may correct the judgment to reflect the dismissal of only the conspiracy conviction." *Id.* at 162. (The court did this because the defendant's other conviction, standing alone, required life in prison. *Id. at 164.* In determining that the judgment for the remaining count was final on the date the mandate was issued, *Burrell* explained, "Our mandate in this case directed the district court to undertake a single non-discretionary act." *Id. at 165.* The court further explained,

> In affirming Burrell's CCE conviction and sentence, our mandate foreclosed the district court from modifying either of them on remand. Burrell could have undone his conviction or sentence only by a timely petition for a writ of certiorari or some other appropriate procedural vehicle. Under both the specific dictate and the spirit of our mandate, no issues, including sentencing issues, remained open for reconsideration on remand. This was not a mandate that permitted the district court to undertake any action other than the ministerial correction explicitly set forth. Our directions to the district court unambiguously permitted nothing more than the entry of an amended judgment reflecting the dismissal of Burrell's conspiracy conviction. Relitigation of any issue in the district court would therefore have been beyond the scope of the district court's authority under our

> mandate. Our remand directing the dismissal of the conspiracy count was therefore strictly ministerial

Id. at 166 (emphasis added). Under these limited circumstances, the *Burrell* court concluded that the case became final for purposes of retroactive analysis when the mandate was issued, rather than when the district court acted on the mandate. *Id.*

As Burrell demonstrates, the focus of this analysis is upon the mandate itself, not on the actions of the trial court after the mandate is issued. If a mandate gave the district court discretion as to the sentence, the judgment is not final until the lower court has acted.

Applying that test to Kilgore's case, the remand for "further proceedings" did not require a mere "ministerial act" on the part of the court. Rather, as acknowledged by the court of appeals, the mandate gave the lower court discretion to modify the sentence however the court might see fit in consideration of the reduced number of convictions. Accordingly, under *Burrell*, Kilgore's case could not have been final until the trial court acted on the remand in 2005.

More factually similar to our case is the Ninth Circuit's decision in *U.S. v. LaFromboise*, 427 F.3d 680 (2005). In that case, a jury convicted the defendant of multiple drug offenses as well as three counts of carrying a firearm. On appeal, the court vacated the three firearm convictions and remanded to the trial court for retrial. Prior to trial, the government

moved to dismiss the three firearm counts. The court granted that motion, but then failed to either conduct a new sentencing hearing on the remaining counts or enter an amended judgment reflecting the dismissed counts. *Id* at 682. Two years later, the defendant filed a habeas action, which the district court dismissed as untimely, based on the issuance of the mandate.

The appellate court reversed. The court explained that a final judgment necessarily includes a final sentence. *Id.* at 683. The court further noted, "[i]mplicit in our mandate to the district court *was the opportunity* for resentencing, whether or not the remanded gun counts resulted in an eventual conviction." *Id.* at 684 (emphasis added). Accordingly, until such time as the district court acted on the mandate—whether to resentence the defendant or amend the judgment and sentence—there could not be a final judgment. *Id.*

Furthermore, explained the court, because there had been a change in the law relating to sentencing (*U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)), the defendant could now rely upon that change. *Id.* at 684 The defendant could do this even though the mandate was issued in 1997, because the judgment was still not final without additional action from the trial court.

The same result is required here. Because Kilgore's case could not become final until the trial court acted in 2005, his case was not final

when *Blakely* was decided. He was entitled to rely upon *Blakely* in insisting that the court impose a reduced sentence and in raising his unlawful sentence on appeal.

Kilgore's case is even stronger than *LaFromboise*. In that case, the federal court had specifically remanded the case for retrial on the dismissed charges. Accordingly, there was some question as to whether any proceeding, other than the dismissal order as to those reversed counts, was necessary to create a final judgment. *See Id.* at 687 (Judge Callahan dissenting). By contrast, in Kilgore's case, the mandate was open-ended, and (as acknowledged by the majority), provided the trial court with discretion to impose a reduced sentence. The mandate did not limit the trial court to a ministerial act, thus the judgment was not final.

The Ninth Circuit in *U.S. v. Colvin*, 204 F.3d 1221 (9th Cit. 2001) employed an even less strict standard, holding that a judgment is not final when the mandate issues if the case has been remanded for *any* further proceedings. The court concluded that if the higher court reverses any portion of a conviction or sentence and remands it back to the trial court for further proceedings, the judgment is not final until the district court has acted on the remand and the time has passed for appealing that action. *Id.* at 1225-26. ("His judgment of conviction did not become final until the time for appealing the amended judgment had passed.")

While this may be the better test, as it eliminates any possible dispute as to what constitutes a ministerial function, the choice of which of these two tests should be adopted by this Court will not bearing on the outcome of this case. The mandate in this case unquestionably permitted the trial court to exercise "discretion, judgment or skill", thus either test is satisfied here. Under federal case law, Kilgore's case could not have been final in 2002.

iii. The alternative formulations of this test for finality offered by the trial court, the prosecutor's office, and the Kilgore majority are not supported by law or the equities.

The court of appeals in *Kilgore* acknowledged that its' mandate was open-ended and gave the trial court discretion to modify the sentence based upon the reversal of two convictions. The court also acknowledged that if the trial court modified the sentence, then *Blakely* applied. Nonetheless, the majority opinion reasoned that when the trial judge decided not to modify the sentence in 2005, the 2002 open-ended mandate was transformed into a ministerial mandate, and that the case therefore became final in 2002. In other words, the characterization of the appellate court's mandate—whether ministerial or not—is determined by the trial court rather than the appellate court. Further, because that characterization cannot be known until the trial court acts, it may be years after the mandate is issued before anyone knows whether the conviction is final.

This is a complete corruption of the test used by the federal courts. As the dissent in *Kilgore* explained, "The characterization of our remand order depends on our language in the context of our decision, not on what the trial court does in response to our language." *Kilgore* at 838 (J. Armstrong dissenting). In other words, finality of the case does not turn on whether the trial court exercises discretion at some point after the mandate is issued. Rather, if the mandate allows the trial court to exercise discretion and change the sentence, then the sentence cannot be final.

Additionally, the majority's alternative formulation of the test just does not make sense. Employing a common sense understanding of the word "final", if the appellate court has told the trial judge that a sentence can be changed on remand, it is not final. In fact, it is no less final than if the appellate court simply vacated the sentence and remanded for a new hearing. In both cases there is uncertainty as to what the ultimate sentence will be until the court acts on the mandate. This is contrary to this Court's discussion of "finality" in *Skylstad.*

The majority decision is also bad policy. For a number of reasons, a defendant needs to know when a judgment becomes final. Most importantly, a defendant has only one year after a sentence becomes final to file a habeas corpus petition. Under the common sense approach taken by the federal courts and this court in *Skylstad*, the judgment becomes final when

the court acts on the mandate. This is an easily identifiable date, and permits a defendant to take action in a timely fashion. By contrast, under the majority opinion, once a defendant learns that the sentence has become final, the time to act upon may very well have passed. Mr. Kilgore's case is a prime example. According to the majority opinion, the judge's actions in 2005 produced a "final judgment" date of 2002. This is an illogical and unfair result, and will result in the quagmire of procedural problems envisioned by this Court in *Skylstad*. The test proposed by the majority is simply unworkable and should be soundly rejected by this Court.

The approach advanced by the State fares no better. Apparently recognizing that a judgment cannot be final if the trial court has discretion to change it, the State argued below that the trial court was powerless to change the sentence once the mandate was issued. *See* Brief of Respondent at 9 ("When the State declined to retry defendant on the two reversed counts, the trial court lost its jurisdiction to resentence the defendant on the five affirmed convictions.") and at 10 ("When the State declined to retry the offenses, the trial court only had the power to remove the vacated convictions from the judgment and sentence.")

This remarkable proposition is the cornerstone of the State's position, but is completely unsupported by cases cited by the State. For instance, in *Sewell v. Sewell*, 28 Wn.2d 394, 184 P.2d 76 (1947), this Court

held that the trial court could not issue child custody orders after an appeal was filed. The case of *Ellern v. Spokane,* 29 Wn.2d 527, 188 P.2d 146 (1947), involved a petition for release from a person committed to an institution as insane. This Court reversed a demure filed by the State, but the insane person took no action within a year of this Court's ruling, and the case was dismissed for want of prosecution. In upholding that, this Court noted that a judgment from the Supreme Court is final and conclusive, and cannot be overridden by the trial court. Finally, in *State v. Barnett,* 42 Wn.2d 929, 259 P.2d 404 (1953), this Court held that a trial court was without authority to order probation after the conviction and sentence had been affirmed on appeal.

None of these cases even begin to suggest that the trial court lacks authority to resentence a defendant on remand following a change in the offender score and the number of current offenses. Moreover, as the court of appeals' specifically acknowledged, Kilgore's mandate did provide the trial court with discretion to impose a different sentence if the trial court so desired.

The court of appeals acknowledgment that the mandate conferred discretion to the trial court is consistent with the general authority accorded to trial courts on remand following a partially successful appeal. As one court explained:

> When a defendant is sentenced on multiple counts and one of them is later vacated on appeal, the sentencing package comes "unbundled." The district court then has the authority " to put together a new package reflecting its considered judgment as to the punishment the defendant deserve[d] for the crimes of which he [wa]s still convicted.'".

U.S. v. Ruiz-Alvarez, 211 F.3d 1181,1184 (2000) quoting *United States v. McClain*, 133 F.3d 1191, (9th Cir.1998). *See also, United States v. Dodson*, 291 F.3d 268, 272 (4th Cir.2002) ("only a single 'judgment of conviction' arises from a case, like this one, in which a defendant is convicted at one trial on multiple counts of an indictment."); *Burrell,* at 163 ("when a defendant is convicted at one trial on multiple counts of an indictment, the district court enters a single judgment of conviction.") Because the State's argument that the trial court had no discretion in this matter is counter-intuitive and lacks legal support, it should be rejected.

Finally, there is the approach taken by the trial court. In an effort to characterize the case as "final" back in 2002, the judge referred to the 2005 order modifying the judgment and sentence as a "nunc pro tunc." But this is a complete misuse of a nunc pro tunc order. "The purpose of a nunc pro tunc order is to record some prior act of the court that was actually performed but not then entered into the record." *State v. Nicholson,* 84 Wn. App. 75, 78-79, 925 P.2d 637 (1966). The judgment was not modified in 2002; that act was performed in 2005. The attempt to predate the order so as to avoid the requirements of the *Blakely* decision was im-

proper. See *State v. Smissaert*, 103 Wn.2d 636, 641, 694 P.2d 654 (1985) (improper after changing a sentence to enter a judgment nunc pro tunc to the date of the original judgment.); *See also Kilgore,* at 838 (J. Armstrong dissenting) ("the trial court attempted to foreclose Kilgore's *Blakely* rights with a nunc pro tunc order entered after *Blakely* purporting to rule that Kilgore's case was final before *Blakely*.")

In sum, none of the alternative approaches advanced by the majority in *Kilgore*, the prosecutor, or the trial court are reasonable alternatives to the established test developed by the federal courts for determining whether a case is final for purposes of retroactive application of a change in the law.

2. The Court of Appeals misapplied *Barberio* when it dismissed Kilgore's appeal.

After concluding that the judgment was final in 2002, the majority decision dismissed petitioner's appeal based on *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993). But *Barberio* has no application here as that case did not involve a significant change in the law since the time of the first appeal. As such, that case does not support the Court of Appeals belief that the court can freely re-impose what has since become an unconstitutional sentence. To the contrary, the *Barberio* Court observed that the trial court did not rely upon an improper grounds for the sentence, but rather, "correctly eliminated defendant's future dangerousness as an ag-

gravating factor." *Barberio*, 121 Wn.2d at 51 (citing to *State v. Pryor*, 115 Wn.2d 445, 799 P.2d 244 (1990)).

By contrast, in the present case, the court did not eliminate that part of the judgment and sentence that the United States Supreme Court had subsequently found to be unconstitutional. Rather, the court re-imposed that sentence, despite the defense warning that doing so would violate *Blakely*. See CP 39-41, 85-89.

In *In re St. Pierre*, 118 Wash.2d 321, 326, 823 P.2d 492 (1992), this Court soundly rejected a notion that a case could be final for one issue, but not for another. The State argued that because a particular issue had not been raised in the first appeal, that issue could not be raised at a later time when the law had changed. The Supreme Court disagreed:

> We interpret the Supreme Court's language to contemplate the finality of the case as a whole, not the finality of a single issue. We reject any notion an issue may become final for the purposes of retroactivity analysis before the finality of the case as a whole. A contrary approach would encourage parties to maintain seemingly frivolous claims on appeal in the hope another decision may announce a new rule. Such an approach would result in an inefficient use of judicial resources and distract parties from issues of consequence.

Id. at 327. If this Court were to apply *Barberio* to shield review of the court's failure to apply a change in the law, it would render the above language meaningless.

Additionally, this interpretation of Barberio would run contrary to the reasoning in *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), where the court discussed "'the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." *Griffith,* at 323. The trial court would be free to pick and choose to whom the new rule should apply. But as noted by the Supreme Court in *Griffith*, "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

Additionally, a rule allowing the trial court to re-impose what is now known by all to be an unlawful and unconstitutional sentence creates contempt for the law. This Court should not embrace the court of appeal's misapplication of *Barberio.*

E. CONCLUSION

For the reasons set forth above, this Court should reverse the court of appeals and remand for a new sentencing hearing consistent with the requirements of *Blakely*.

Respectfully submitted on this 11th day of September, 2008

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